In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-377

MAURICE S. OSSER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that a taped telephone conversation was improperly introduced at trial as substantive evidence and that its acquisition in the absence of his attorney deprived petitioner of his right to counsel.

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner, then City Election Commissioner for Philadelphia, was convicted of mail fraud, conspiracy and endeavoring to obstruct justice, in violation of 18 U.S.C. 1341, 371 and 1510. He was sentenced to two consecutive three year terms of imprisonment and fined $19,000. The court of appeals affirmed (Pet. App. B).

The facts, which are set forth in the opinion of the court of appeals (Pet. 33-35), show that Leon Freedman, a salesman for Weiss Printing House, had sought petitioner's

assistance to procure city council printing contracts for Weiss. Freedman subsequently paid one-third of his fifteen per cent commission from Weiss to petitioner in return for petitioner's actions in guaranteeing the contract to Weiss. In 1965, Freedman's commission was increased, and he increased his payments to petitioner to six and one-half per cent for about three years. This arrangement eventually was expanded to embrace election ballot printing for the city.

During early 1972, a federal grand jury investigated various frauds on the city during petitioner's term of office. The grand jury indicted petitioner on February 25, 1972, for involvement in fraudulent schemes involving rigging of contracts for election machines. That indictment, as amended May 17 and May 24, 1972, led to another trial in the Eastern District of Pennsylvania separate and distinct from the charges and trial of the indictment involved in this case.

Following presentment of the first indictment, the grand jury continued to hear evidence against petitioner. In March 1972 it subpoenaed Freedman in connection with an investigation of rigging of city council minutes and election ballot printing contracts. Freedman originally invoked the Fifth Amendment at the grand jury hearing, but later decided to cooperate with the government after receiving a promise of immunity.

At trial, Freedman testified that in mid-April 1972, petitioner called him and arranged a meeting for the next morning (Tr. 84). At that meeting, petitioner asked Freedman if he had been interviewed by government investigators; he urged Freedman, on the basis of their long friendship and Freedman's own best interests, not to say anything about their prior dealings (Tr. 86). On the evening of May 17, 1972, petitioner again called Freedman.

He inquired about Freedman's next visit to the Department of Justice Strike Force Offices and pleaded with Freedman not to say anything (Tr. 87). Freedman told petitioner that he had an appointment to see the Strike Force attorneys on Friday morning, May 19, 1972. Petitioner told Freedman that petitioner's life depended on Freedman's silence because he stated that he would rather commit suicide than go to jail (Tr. 87). On the following morning, May 18, 1972, petitioner visited Freedman's store and again pleaded with Freedman to say nothing (Tr. 87). On Friday afternoon, May 19, Freedman received another phone call from petitioner which he had given the federal agents permission to tape record (Tr. 88).

After Freedman testified that this tape (G. Ex. 3) contained an exact recording of his conversation with petitioner on May 19, 1972, the tape was received in evidence at the instant trial (Tr. 108), and then played for the jury (Tr. 118-134). It detailed additional efforts by petitioner to find out what Freedman was telling the government agents (Tr. 118-120, 122, 124, 127-128) and to persuade Freedman to remain silent (Tr. 124, 130, 132, 134).

1. Petitioner's claim that the taping deprived him of his right to counsel under *Massiah* v. *United States,* 377 U.S. 201, is thoroughly discussed and correctly rejected in the opinion of the court of appeals (Pet. App. 37-44), upon which we rely.

2. The additional claim that the tape was improperly used as direct evidence is frivolous. Petitioner's contention on this issue appears to be that, prior to the introduction of the tape, Freedman "did not testify on the subject matter of the recorded conversation but merely identified the tape. The recording itself was introduced as substantive evidence" (Pet. 11). The appropriate procedure, it is asserted, would have been to ask Freedman his re-

collection of the tape recording first, and then admit it. But Freedman testified that during a recess which proceeded his testimony, he had listened to the tape and that to his recollection it was an exact recording of the conversation (Tr. 107-108). Exactly how petitioner was prejudiced by the precise manner in which the tape was admitted is not made clear. His claim was properly rejected by the court of appeals (Pet. App. 46).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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